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2007

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No. 07-575

In the Supreme Court of the United States

THOMAS CARROLL, WARDEN OF THE DELAWARE CORRECTIONAL CENTER,

Petitioner

v.

DAVID STEVENSON, MICHAEL MANLEY, MICHAEL L. JONES,

Respondents

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF OF *AMICI CURIAE* THE COMMONWEALTH OF PENNSYLVANIA, THE STATES OF ALASKA, COLORADO, HAWAII, AND NEW HAMPSHIRE, AND THE COMMONWEALTH OF PUERTO RICO, IN SUPPORT OF PETITIONER

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INTEREST OF THE *AMICI CURIAE*

The Commonwealth of Pennsylvania and the amici states have a strong interest in the administration of their prisons and detention facilities. Specifically, they have an interest in maintaining high security housing for their most dangerous prisoners, including pretrial detainees who are awaiting retrial or resentencing. The Third Circuit's ruling in *Stevenson v. Carroll*, 495 F.3d 62 (3d Cir. 2007), creates a liberty interest for detainees in being housed in pretrial general population. This appears to require due process for prisoners who are not even being transferred after a sentence is vacated, as well as for those who are being transferred into pretrial high-security housing.

The Third Circuit's holding in *Stevenson* is overly broad and will require due process for all administrative transfers of detainees. Pet. App. at 15. This ruling will affect all jurisdictions in the circuit, including Pennsylvania. Due process for all administrative transfers of detainees will create an administrative burden that will not be justified by any substantial benefit for detainees, particularly in the case of prisoners who have been charged with or convicted of capital crimes who would reasonably expect to be confined in a highly secure custody status.[1]

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[1] Authority to file this brief is provided under Supreme Court Rule 37.4, which provides in pertinent part that "no motion for leave to file an *amicus* brief is necessary if the brief is presented on behalf of . . . a State, Commonwealth, Territory, or Possession when submitted by its Attorney General." Sup. Ct. R. 37.4. Counsel of Record for all parties received notice at least

SUMMARY OF ARGUMENT

The Court should grant the writ to resolve conflicts among the Court of Appeals on the questions of whether administrative transfers of pre-trial detainees implicate procedural due process concerns and the related question whether the rationale of *Sandin v. Conner* applies to them. On the first point, the Third Circuit's decision conflicts with those of the Sixth and Seventh Circuits, and on the second, the decision of the Third Circuit, together with that of the Second Circuit, is in conflict with decisions of the Sixth and Eight Circuits.

There is also confusion among the Courts of Appeals regarding the treatment of detainees in the substantive due process context. The Third Circuit has held that detainees enjoy greater constitutional protections than convicted and sentenced inmates, and this places it in conflict with decisions of the Fifth, Tenth, and Eleventh Circuits.

These issues are important to the states because the decision of the Third Circuit adds a layer of procedures applicable to the administrative transfer of pre-trial detainees which will aid the prisoners only marginally, at the cost of significant bureaucratic distractions for prison officials.

REASONS FOR GRANTING THE PETITION

The Third Circuit has announced a broad rule that all pretrial detainees have a liberty interest entitling them to notice and an opportunity to respond any

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ten days prior to the due date of the *amicus curiae's* intention to file this brief.

time they are transferred to more restrictive housing. This differs from the results reached by other courts of appeal, which have concluded that administrative transfers do not implicate pretrial detainees' liberty interests.

I. Certiorari Should Be Granted To Review The Third Circuit's Ruling That Detainees Are Entitled To Due Process When Transferred To More Restrictive Housing.

The federal courts of appeals need guidance on the requirements of procedural due process in the context of administrative transfers of detainees. Currently, it is difficult to reconcile the rationales of the different lower court decisions on this topic. These conflicting decisions suggest deep confusion among the courts as to the source and occasion of a liberty interest for detainees in the housing context.

A. The lower federal courts need guidance here.

The courts of appeals have divided both on the question whether administrative transfer of pre-trial detainees implicate due process and on whether the rationale of *Sandin v. Conner* applies to pre-trial detainees as well as convicted prisoners.

The Sixth and Seventh Circuits have held that administrative transfers of detainees generally do not implicate procedural due process concerns. *See Martucci v. Johnson*, 944 F.2d 291 (6th Cir. 1991); *Holly v. Woolfolk*, 415 F.3d 678, 679 (7th Cir. 2005); *Higgs v. Carver*, 286 F.3d 437, 438 (7th Cir. 2002); *Zarnes v. Rhodes*, 64 F.3d 285 (7th Cir. 1995); *Crane*

v. Logli, 992 F.2d 136 (7th Cir. 1993). These holdings conflict with the Third Circuit's holding in this case.

Also, as mentioned in the Petition (at 13-15), some circuits apply *Sandin v. Conner*, 515 U.S. 472 (1995), analysis to detainees while some do not. *Compare Polk v. Parnell*, 132 F.3d 33 (table), 1997 WL 778511 (6th Cir., Dec. 8, 1997) (*Sandin* analysis applied to a detainee); *Johnson v. Esry*, 210 F.3d 379 (table) 2000 WL 375269 (8th Cir., Apr. 13, 2000) (same); *with Benjamin v. Fraser*, 264 F.3d 175, 188-89 (2d Cir. 2001) (*Sandin* analysis does not apply to detainees); *Fuentes v. Wagner*, 206 F.3d 335, 341-42 n.9 (3d Cir.), *cert. denied*, 531 U.S. 821 (2000) (same).

B. The Third Circuit's ruling in *Stevenson* conflicts with this Court's ruling in *Bell v. Wolfish*.

One of the central principles of *Bell v. Wolfish* is that discomfort imposed upon a detainee due to conditions that are rationally related to a legitimate government objective does not constitute punishment. 441 U.S. 520, 537, 539-40, 545-46 n.28, 547 n.29 (1979). This principle was stated repeatedly and in various ways.

The Court noted that the principle of deference to prison officials' expertise applies equally in the context of convicted inmates and pretrial detainees. *Id.* at 547, n.29. It stated that pretrial detainees implicate security concerns to the same extent as convicted inmates do. *Id.* at 546, n.28. Detainees are lawfully incarcerated just as inmates are, and that such incarceration itself brings about many

restrictions and discomforting conditions. *Id.* at 545-46.

This principle in *Bell* was echoed in *Block v. Rutherford*, 468 U.S. 576, 587 (1984), where the Court stated, "It is no answer, of course, that we deal here with restrictions on pretrial detainees rather than convicted criminals." Despite the clarity of these principles in *Bell* and *Block*, the Third Circuit in *Stevenson* appears to be resurrecting a fundamental division between the two groups as they are impacted by prison transfer decisions.

As noted in the Petition at 16, the Court has found that prisoners have a liberty interest in administrative prison transfers and classification decisions only where state law created such an interest. *See Meachum v. Fano*, 427 U.S. 215, 228-29 (1976); *Montanye v. Haymes*, 427 U.S. 236 (1976); *Olim v. Waukinekona*, 461 U.S. 238 (1983). Although the holdings of this trio of cases were based in part on the truncation of a liberty interest by the fact of a criminal conviction, *Bell* extended this logic by stating that the fact of lawful incarceration similarly curtails a detainee's liberty interest:

> But our cases also have insisted on a second proposition: simply because prison inmates retain certain constitutional rights does not mean that these rights are not subject to restrictions and limitations. "Lawful incarceration brings about the necessary withdrawal of limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system." The fact of confinement as well as the legitimate

> goals and policies of the penal institutions limits these retained constitutional rights. There must be a "mutual accommodation between institutional needs and objectives and the provisions of the Constitution that are of general applications." *This principle applies equally to pretrial detainees and convicted prisoners. A detainee simply does not possess the full range of freedoms of an unincarcerated individuals.*[2]

441 U.S. at 545-46. Since the detainee's liberty interest is curtailed by lawful incarceration, just as the convicted inmate's liberty interest is curtailed by lawful conviction and incarceration, a logical inference from *Bell* is that the holdings of *Meachum*, *Montanye* and *Olim* should apply to detainees. If so, then the Third Circuit is incorrect that detainees are entitled to due process, even in the absence of a state law-created interest, when administratively transferred to more restrictive housing.

C. This issue is important to the administration of state prisons.

The Third Circuit's holding creates a procedural due process right for all pretrial detainees at or about the time of transfer to a higher security housing area than general population, regardless of the reason for the transfer. Pet. App. at 15. Although this rule will aid detainees only marginally, it will create significant bureaucratic distractions for prison officials.

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[2] Citations omitted and emphasis added.

There are many reasons detainees may be transferred to higher security housing: a supervisor may disagree with a subordinate's initial judgment as to an individual's dangerousness, an individual may be associated with a conflict or potential conflict with other inmates indicating a need for separation, an individual may be the subject of an informant's tip about an impending incident, there may be a temporary housing shortage in one security area but not another, *et cetera*. The housing change could be for a day, a week, or a year. Any detainee should expect to experience housing transfers that are incidental to incarceration.

In a large prison or detention facility, such transfers are made with respect to thousands of prisoners. If every transfer to arguably more restrictive conditions requires due process, the administrative burden on prison officials will be increased substantially.

Further, the additional burden imposed on prison authorities will often have little or no point. The Court of Appeals has acknowledged that it will normally be easy for prison officials to show by affidavit that their administrative decisions are prompted by security concerns rather than a desire to punish, Pet. App. at 13, and in this case, the security concerns are so self evident as to require no proof. Prisoners who have been charged with or convicted of capital crimes ought to be considered security risks and ought to be housed in a highly secure environment – it would be surprising if they were not.

II. Certiorari Should Be Granted To Review The Third Circuit's Ruling That The Complaint Stated A Claim For A Substantive Due Process Violation.

There is much greater uncertainty in the law with respect to the rights of detainees than with respect to the rights of convicted inmates. The confusion among the lower courts as to how to treat detainees in the procedural due process context is mirrored in the substantive due process context. Thus, we see some circuits regarding substantive due process standards as equivalent to Eighth Amendment standards, while others reject that view. *Compare Hamm v. DeKalb County*, 774 F.2d 1567, 1574 (11th Cir. 1985) (holding that, with respect to the requirement of basic necessities of life, "the fourteenth amendment rights of detainees can be defined by reference to the eighth amendment rights of convicted inmates."); *Jordan v. Doe*, 38 F.3d 1559, 1564-65 (11th Cir. 1994) (same); *Cottrell v. Caldwell*, 85 F.3d 1480, 1490 (11th Cir. 1996) (same); *Lopez v. LeMaster*, 172 F.3d 756, 759 n.2 (10th Cir. 1999) (same); *Olsen v. Layton Hills Mall*, 312 F.3d 1304, 1315 (10th Cir. 2002) (same); *Hare v. City of Corinth, MS*, 74 F.3d 633, 647-48 (5th Cir. 1996) (where detainees and convicted inmates share same constitutional right, they are entitled to equal degree of protection), *with Hubbard v. Taylor*, 399 F.3d 150 (3d Cir. 2005) (detainees entitled to greater constitutional protection than convicted inmates).

Looking at both the procedural and substantive contexts, we see that some circuits place more emphasis on the proposition that prisoners, *a fortiori* including detainees, do not forfeit all constitutional

protections; others place more emphasis on the proposition that "lawful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system." *Bell*, 441 U.S. at 545-46, quoting *Price v. Johnston*, 334 U.S. 266, 285 (1948).

As more time passes since the *Bell* opinion was issued, the gap between the two positions with respect to detainees grows larger. In some circuits, there is a trend towards greater protection of detainees that is increasingly inconsistent with *Bell v. Wolfish*. *Compare Sistrunk v. Lyons*, 646 F.2d 64 (3d Cir. 1981) (presumption of innocence is not a source of any substantive right for detainees), with *Stevenson*.

In *Stevenson*, the complaint itself provides the reasonable relationship to a legitimate government objective: Stevenson, Manley, and Jones admit they are all charged (and two of them are both charged and convicted) with first degree murder. The decision by the Third Circuit may be viewed as an extension of the holding in *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163, 168 (1993), that notice pleading is sufficient in a Section 1983 action. Still, the principle of judicial deference to the discretion of prison officials – so stressed in *Bell v. Wolfish* – should have some bearing on the willingness of the federal courts to submit prison officials to the discovery process in every case where the term "punitive" is used, or where it is alleged that others are treated dissimilarly. At least some insubstantial prisoner complaints must be dismissed so that litigation does not become the central activity of prison officials.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

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